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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-443

HUGH CAREY, et al.,

Appellants,

v.

POPULATION SERVICES INTERNATIONAL, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION, AMICUS CURIAE

Interest of Amicus

The American Civil Liberties Union is a private, nonprofit membership corporation engaged solely in defense of the Bill of Rights. During its fifty-six years, the ACLU has devoted substantial effort to protecting the rights guaranteed by the First Amendment, in protecting the rights of juveniles from arbitrary and irrational invasion by the

State, and in facilitating access to all methods of contraception. These several areas coalesce in this case because of the New York state statute involved.

In this brief we demonstrate through reliable statistical and empirical evidence that interference with the ability of minors under sixteen freely to procure non-prescription contraceptive devices, takes an unacceptable medical and social toll.

Statute Involved

New York State Education Law § 6811(8)
(McKinney 1972)

"It shall be a class A misdemeanor for:

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of

sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited."

Argument

The Conceded Absence of Proof That Section 6811(8) Serves the State's Asserted Interest in Discouraging Sexual Activity by Minors, Leaves Intact the Right of Privacy of Minors in the Area of Reproductive Freedom Sought to Be Regulated by Sec. 6811(8), and Requires That it Be Declared Un-Constitutional.

The State of New York attempts to justify its statutory prohibition against the sale of contraceptive devices to minors under the age of sixteen without a physician's prescription, by asserting that it serves a valid state purpose of discouraging sexual activity by those children. Brief of Appellant, pp. 15, 16-18, 21. The state advances this justification in the teeth of its concession below that "there is no evidence that teen-age extramarital sexual activity increases in proportion to the availability of contraceptives." 398 F. Supp. 321, 332. (Cf. Brief for Appellant 21.) Indeed, not only is there no evidence

to support the State's asserted justification, there is a wealth of evidence which leads irrevocably to the conclusion that the real consequences of the State's policy disserve the interests protected by the constitutional right of privacy because they inflict devastating medical and social injury upon the private lives of affected minors. See Planned Parenthood v. Danforth, U.S. (1976). This brief is confined to a description of that evidence.

Pregnancy and Abortion

The rate of live births among minors in New York State is staggering. In New York City alone there were 5,992 live births to girls between 15 and 17 in 1975, and 395 live births to girls under the age of 15.^{1/} Statewide, there were 626 live births in the under 15 age group in 1974. But live births reveal only a fraction of the pregnancy rate in the minor population. Thus, in 1975, there were 13,486 pregnancies among girls

^{1/} Unless otherwise noted, all 1974 and 1975 New York City and State statistics cited in this brief were secured from Ms. Frieda Nelson, Research Analyst, Bureau of Maternity Services and Family Planning, New York City Department of Health. The letters containing that statistical information have been filed with the Clerk of the Court.

13 to 16 throughout the state.^{2/} The discrepancy between pregnancy and live births is accounted for in 1975 by the 9,805 abortions performed in New York City on girls between 15 and 17 and the 1,136 abortions performed on girls under 15. The abortion rate among girls under 16 has now exceeded the live-birth rate for that age group.

Mortality

Special medical risks to the young girl and the infant she bears are much higher than for older mothers. The risk that infants born to very young mothers will be stillborn or die soon after birth is extremely high. In New York City in 1974, of 6,456 live births to women 17 and younger, there were 180 infant deaths. Females under the age of 15 had the highest ratio of infant mortality per 1,000 live births, 42.1 as contrasted to 13.6 for women between the ages of 25 and 29, and 27.0 for women between the ages of 15 and 17. The data strongly suggests that the high infant mortality rate among young mothers is directly related to the immature biologic development of the mother

^{2/} New York State Health Department, Bureau of Family Planning, Pregnancy Trends Among Teen-agers, New York State, 1971-1975.

rather than to external environmental factors.^{3/}

The chance of survival of infants born to mothers under 16 is reduced even further by the fact that the vast proportion of them are born out-of-wedlock. In 1975, of the 5,992 live births to New York City girls between 15 and 17, 4,756 were out-of-wedlock. In the same year, 375 out of the 395 births to New York City girls under 15 were illegitimate. Virtually all of the pregnancies in the under 16 group were conceived out-of-wedlock and only a very small percent were legitimated by marriage in the course of pregnancy.^{4/}

New York City and other^{5/} statistics

^{3/} Gordon, S., The Sexual Adolescent (Duxbury Press, 1973).

^{4/} Zelnick and Kantner, "The Resolution of Teen-age First Pregnancies," Family Planning Perspectives, Vol. 6, No. 2 (Spring, 1974), p. 79.

^{5/} Shapiro, Schlesinger, Nesbit, "Infant, Prenatal, Maternal and Childhood Mortality in the United States," Harvard University Press, 1968, p. 10; NCHS, "Infant Morality Rates by Legitimacy Status: United States, 1964-1966," Monthly Vital Statistics Report, Vol. 20, No. 5, 1971.

clearly establish that infant mortality is much higher for illegitimate children. In 1974, the infant mortality rate for illegitimate babies was 26.5 per 1,000, while the rate for legitimate babies was 14.0 per 1,000. This is attributable partly to the fact that unmarried pregnant women are less likely to obtain proper prenatal care and also to the postnatal environment of the unwed mother which is commonly less than satisfactory.^{6/}

Infants of very young mothers who do survive are much more likely to suffer serious mental and physical defects. Statistics demonstrate that the percentage of infants who are of low birth weight (less than 2,500 grams^{7/}) is substantially higher for those born to young teen-age mothers than to older women. New York City statistics for 1975 establish that 14.4 percent of infants born to mothers under 15 weighed

^{6/} Population and the American Future, Report of the Commission on Population Growth and the American Future, p. 145.

^{7/} Low birth weight is associated with a variety of problems, including mental retardation, epilepsy and cerebral palsy. Menken, "The Health and Social Consequences of Teen-age Childbearing," Family Planning Perspectives, Vol. 4, No. 3 (July 1972), p. 50 n. 42 and sources collected therein.

less than 2,500 grams, compared to 9.1 percent of infants born to all other mothers.

Venereal Disease

There is a high incidence of venereal disease among young people which could be prevented by the use of condoms. In 1975, 303 cases of gonorrhea and syphilis were detected in youngsters under the age of 15 in New York City. For the 15-19 age group, 8,350 cases of gonorrhea and syphilis were reported. Indeed, in response to these alarming venereal disease data, New York State law has been amended to permit physicians to treat minors of any age for venereal disease regardless of their parents' knowledge or consent.^{7a/} The elimination of any age requirement for treatment underscores the irrationality of the statute challenged in this case, which rejects the right of young people to prevent the disease which they have the right to cure.

Education

Quite apart from medical hazards, early childbearing means yet another generation of poverty and lost opportunity for both mother and child. Arthur Campbell has observed about the young teen-age mother:

Suddenly she has 90 percent of her life's script written for her. She

^{7a/} New York Social Services Law, §350(1)(e).

will probably drop out of school, even if someone else in her family helps to take care of the baby; she will probably not be able to find a steady job that pays enough to provide for herself and her child; she may feel impelled to marry someone she might not otherwise have chosen. Her life choices are few, and most of them are bad. Had she been able to delay the first child, her prospects might have been quite different.^{8/}

In New York City alone the Board of Education estimates that approximately 3,000 to 3,500 girls of school age became pregnant in the school terms between 1972 and 1974.^{9/} Despite the fact that alternative educational programs have been available since 1968,^{10/} the estimated dropout rate due to pregnancy is nonetheless

^{8/} "The Role of Family Planning in the Reduction of Poverty," Journal of Marriage and the Family, 30:236, 1968.

^{9/} Conversation with Mrs. Ruby Day, Schools for Pregnant Girls, New York City Board of Education, and Mr. Brown, Statistical Accounting, New York City Board of Education.

^{10/} Education of Pregnant Students, Special Circular No. 10, Board of Education of the City of New York (1968-69).

high.^{11/} Indeed, pregnancy is the number one school dropout cause among females in the United States.^{12/}

Poverty

Another indicator of the poverty that envelops the teen-age mother is the fact that a large proportion of them require public assistance.

In 1960, among mothers under 15 years old, 92 percent delivered on general hospital ward service. Of the 15-19 year olds, 73.7 percent gave birth on general service. In contrast, only 39 percent of mothers in their twenties delivered on general ward service. With the advent of Medicaid, the rising number cared for on general service was reduced or slightly reversed. Thus, in 1973, 81 percent of mothers under 15 years delivered on general service and 73.9 percent of mothers 15-19 years of age delivered on general service, but only 39.5

^{11/} See, Population Commission, Report, p. 145-146. The New York City Board of Education has announced the closing of the city's five special schools for pregnant girls. New York Times, September 25, 1976. Inevitably, the dropout rate will increase.

^{12/} Gordon, supra, p. 33.

percent of mothers in their twenties delivered on general service. It is thus apparent that teen-agers may be physically capable of bearing children but financially incapable of caring for them. In the great majority of cases they must rely on the community for support.^{13/}

Illegitimacy

In addition to poverty, illegitimacy continues to be a condition subject to great disabilities. Although this Court has rejected discrimination against illegitimate children in a variety of contexts,^{14/} some disabilities persist.^{15/} In New York, for example, inheritance rights are entirel

^{13/} Pakter, Jean, M.D., M.P.H., O'Hare, Donna, M.O., and Nelson, Frieda, B.A., "Teenage Pregnancies in New York City: Impact of Legalized Abortions." Paper presented at the 102nd A.P.H.A. Annual Meeting, October 23, 1974, New Orleans, La., Table IIA.

^{14/} See, e.g., Jiminez v. Weinberger, 417 U.S. 628 (1974).

^{15/} Labine v. Vincent, 401 U.S. 532 (1971).

contingent upon a judicial order of filiation entered within two years of the child's birth. Enforceability of support also requires such a filiation order within two years of birth or within two years of a voluntary payment.^{16/} Moreover the stigma of illegitimacy persists and the loss of self-esteem of illegitimate children, and their poor social performance, have been documented.^{17/}

Divorce

When pregnant teen-agers do marry, they are three times as likely to divorce as those who enter marriage at a more mature age:

The highest divorce rate in the United States is among teen-agers. Half of the women who become mothers for the

^{16/} See New York Fam. Ct. Act, §517; New York Estates, Powers & Trust Law, §4-1.2; In re Estate of Crawford, 315 N.Y.S. 2d 890 (Sur. Ct., Chautauqua Co., 1970); In re Estate of Hendrie, 326 N.Y.S. 2d 646 (1971); In re Estate of Belton, 335 N.Y.S. 2d 177.

^{17/} See Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 Am. J. Sociology 169 (1958).

first time do so before age 21. More than 50 percent of the marriages of high school girls occur when the girl is pregnant. The rate increases to 80 percent when the boy involved is also a high school student. Divorce rates run three times higher in teenage marriages compared with those consummated between ages 21 and 45.^{18/}

Though, as stated, appellant justifies the statute at issue here on the ground that it deters young people from engaging in sexual intercourse on the assumption that the fear of pregnancy is an effective deterrent to intercourse, evidence shows that a teenager's decision to refrain or not from intercourse is unrelated to the use of contraception. A recent Los Angeles study^{19/} involved 502 unmarried, never pregnant girls between the ages of 13 and 17 who were seeking contraception for the first time at five different Los Angeles clinics.

^{18/} Lieberman, J., "Behavior Research in Population Planning," Professional Psychology 1, no. 3 (Spring 1970); Gordon, supra, p. 34.

^{19/} Settlege, Baroff, Cooper, "Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance for the First Time." Family Planning Perspectives, Vol. 5, No. 4 (Fall, 1973).

No such patient was excluded from the study and the sample transcended racial and socioeconomic lines. Girls from welfare families were slightly underrepresented in the sample and girls from families with an income in excess of \$20,000 were slightly overrepresented.

The study revealed that 96 percent of the girls were already sexually active when they came for contraception and 58 percent had been active for over a year. The inescapable inference from this data is that the request for contraception follows established sexual practices and does not stimulate it. In another carefully developed study^{20/} based on a national probability sample of 411 adolescents aged 13 to 19, those youngsters who were virgins gave three major reasons for never having any sexual experiences. In the order agreed to by all virgin adolescents, the reasons were:

Because I'm not ready for it;

Because I haven't met a girl/boy who I would want to have sex with;

Because I haven't met a girl/boy who wants to have sex with me.

^{20/} Sorenson, R. C., Adolescent Sexuality in Contemporary America, (New York, World Publishing Co., 1973), p. 166.

The fear of pregnancy is apparently not a deterrent to youngsters who are otherwise disposed to begin sexual activity. Thus the authors of the Los Angeles study conclude that, "[c]learly, the decision to have intercourse was unrelated to contraceptive use.^{21/}

There is, moreover, no reliable evidence to support appellant's suggestion that teen-agers who engage in sexual intercourse would not use contraception even if they had access to it.^{22/} On the contrary, several recent studies of teen-age sexuality reveal that a large number of young teen-agers appreciate the serious consequences of out-of-wedlock birth and would and do use contraception if and when it is available.^{23/} Several of these studies involved

^{21/} Settlage, Baroff, Cooper, supra.

^{22/} Defendants' memorandum of law in opposition to Plaintiffs' motion for a three-judge court, pp. 23-24.

^{23/} Furstenberg, Frank, Gordis, "Birth Control Knowledge and Attitudes Among Unmarried Pregnant Adolescents: A Preliminary Report." Journal of Marriage and the Family, 31:34-42 (1969); Gobble, Vincent, Cochrane & Lock, "A Non-Medical Approach to Fertility Reduction," American Journal of

the distribution of free condoms to hundreds of adolescent males from inner city ghettos. They conclude that adolescent males, if given the opportunity, will share responsibility for pregnancy prevention and that "condoms are acceptable to adolescents in a magnitude previously unappreciated."^{24/}

Footnote 23 Cont'd

Obstetrics and Gynecology, 34, 6:888-91 (December 1969); Arnold & Cogswell, "A Condom Distribution Project for Adolescents," American Journal of Public Health, 61:739-50 (April, 1971); Arnold, "Sexual Behavior of Inner City Adolescent Condom Users," Journal of Sex Research, Vol. 8, No. 4, pp. 298-309 (Nov. 1972).

^{24/} Arnold, supra.

Conclusion

For the reasons set out above, the decision below should be affirmed.

Respectfully submitted,

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October, 1976